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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-99

IN RE KAUFFMAN MUTUAL FUND ACTIONS

(JOSEPH B. KAUFFMAN, *Petitioner*)

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(For List of Counsel, See Pages 25-34)

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

These derivative actions were dismissed by the United States District Court for the District of Massachusetts because of the failure of petitioner (hereinafter "plaintiff") to allege with sufficient particularity excuse for not making demand upon the directors of each of the four mutual funds (the "Kauffman funds") on whose behalf he seeks to sue.[1] The decision of the District Court was affirmed by the

[1] Plaintiff is a shareholder in The Dreyfus Fund, Inc., Manhattan Fund, Inc., Fidelity Trend Fund, Inc., and The Putnam Growth Fund. Fidelity Trend Fund, Inc., is a Massachusetts corporation; The Putnam Growth Fund is a Massachusetts business trust. These two funds are sometimes hereinafter referred to as the "Massachusetts Kauffman funds." The word "directors" as used in this brief includes the trustees of The Putnam Growth Fund.

Court of Appeals for the First Circuit, which did not reach the District Court's further holding that the complaint also failed to allege sufficient excuse for not making demand upon the shareholders of the Massachusetts Kauffman funds.

QUESTION PRESENTED

Only one question need be reached to determine whether the Petition should be granted:

> Should this Court review a case in which none of the considerations set forth in Rule 19 of the Rules of the Supreme Court is present and in which both Courts below found that the complaint failed to allege with the particularity required by Fed. R. Civ. P. 23.1 sufficient reasons to excuse plaintiff's failure to make demand upon the directors?

The Petition seeks to raise two other issues, both resolved in favor of respondents (hereinafter "defendants") by the Courts below, neither of which need be reached unless this Court answers the foregoing question in the affirmative. In that event the additional issues presented are as follows:

> 1. Should this Court review the exercise of discretion by the Court of Appeals (a) in refusing to accept as an enlargement of the record on appeal an affidavit tendered with a petition for rehearing, and (b) in refusing permission to amend the complaint in accordance with the affidavit, where the proffered affidavit and the proposed amendment would not cure defects in the complaint found by the Courts below?
>
> 2. Should this Court review the determination of the District Court that demand upon the shareholders of two Massachusetts-based funds was also required, where the District Court correctly followed *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261 (1917), in holding that demand upon shareholders is required in a derivative action under the Sherman Act, 15 U.S.C. § 1, and where the Court of Appeals found it unnecessary to pass upon that issue?

PROCEDURAL RULE INVOLVED

The Petition involves Rule 23.1 of the Federal Rules of Civil Procedure ("Rule 23.1"). The full text of this Rule is as follows:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

STATEMENT OF THE CASE

A. History of the Litigation Prior to Transfer to the District of Massachusetts

Plaintiff, who is also a counsel of record, is a shareholder in the four Kauffman funds. His complaint, filed in December 1968, contained three counts. Count I, which is the only

count before the Court, alleges that defendants, in contravention of the antitrust laws, conspired to fix the management fees paid by each mutual fund to its investment adviser, to limit competition in the business of providing investment advisory services and to refrain from providing internal investment management. Counts II and III, which allege various causes of action under the federal securities laws, have been severed.

Plaintiff's suit was instituted in a variety of capacities[2] against 141 defendants, comprising each of the Kauffman funds and 61 other funds in which plaintiff owned no shares,[3] their investment advisers, directors affiliated with both funds and advisers, and the Investment Company Institute, the trade association for the mutual fund industry. Each named defendant other than the Investment Company Institute was also sued as a representative of a class of other funds, advisers and affiliated directors.

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[2] Plaintiff sought to maintain this action (a) in his own right as a shareholder in the four Kauffman funds, (b) as a class representative on behalf of all other shareholders of the 65 defendant funds and all other funds affiliated therewith or related thereto, (c) derivatively on behalf of the four Kauffman funds, (d) by virtue of his representative status, derivatively on behalf of the 61 non-Kauffman funds and all other funds affiliated therewith or related thereto and (e) by virtue of his derivative status, representatively on behalf of the 61 non-Kauffman funds and all other funds affiliated therewith or related thereto. *See Kauffman v. The Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

[3] It would appear that the selection of these fund defendants was based upon their size since plaintiff chose to name only funds with assets in excess of $100,000,000. Moody's Bank & Finance Manual a53 (1968); A. Wiesenberger, Investment Companies, Mutual Funds and Other Types 104-109 (28th ed. 1968).

In each of the Kauffman funds the unaffiliated directors [4] constituted a majority of the board. (Respondents' Appendix [hereinafter "Resp. App."] 18a-27a). No unaffiliated director of any of these funds (or of any other fund) was joined either as a named defendant or as a member of any defendant class, and none was named as a co-conspirator. (Compl. ¶¶ 30-31 at Petitioner's Appendix [hereinafter "Pet. App."] B9-B10). Nevertheless, plaintiff admittedly made no prior demand upon the directors or shareholders of the Kauffman funds.

Faced with this monumental complaint, defendants, in April 1969, filed a detailed schedule of motions. (Resp. App. 1a-13a). Included were motions challenging the standing and capacity of plaintiff, motions addressed to jurisdiction, venue and process, and motions under Rule 23.1.

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[4] The Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.* (herein referred to as the "Act"), closely regulates and controls the mutual fund industry. The Act defines an investment company (herein referred to as a "fund") as a business primarily engaged in investing, reinvesting or trading in securities, 15 U.S.C. § 80a-3(a), and an investment adviser (herein referred to as an "adviser") as one who furnishes investment advice to a fund pursuant to a written contract, 15 U.S.C. § 80a-2(a)(20). Most funds are "externally managed" by the adviser which generally has formed the fund and some of whose directors are also directors of the fund. This mode of management is contemplated by the Act.

During the period in question, any fund director was deemed "affiliated" with the adviser if he was an officer, director, partner, or employee of the adviser or owned 5 per cent or more of the voting securities of the adviser. 15 U.S.C. § 80a-2(a)(3). Section 10(a) of the Act, at the time this action was commenced, provided that at least 40 per cent of the directors of a fund must not be "affiliated" with the fund's adviser, subject to certain specific exceptions. 54 Stat. 806. It was the intent of Congress that these unaffiliated directors would be "independent, watch-dog directors." *Moses v. Burgin*, 445 F.2d 369, 376 (1st Cir.), *cert. denied*, 404 U.S. 994 (1971).

The District Court directed that the motions addressed to plaintiff's standing as a class representative be briefed and argued first (Resp. App. 14a-15a), denied these motions, and certified them for interlocutory appeal. *Kauffman v. The Dreyfus Fund, Inc.*, 51 F.R.D. 18 (D.N.J. 1969). The Third Circuit reversed and ordered the complaint dismissed except to the limited extent that it alleged derivative claims on behalf of the four Kauffman funds. *Kauffman v. The Dreyfus Fund, Inc.*, 434 F.2d 727, 738 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). See clause (c) of footnote 2 at page 4, *supra*.

After the action was remanded to the New Jersey District Court, plaintiff consented to the granting of defendants' motions directed to jurisdiction, venue and process. The District Court severed Count I from the other counts, divided Count I into ten separate actions, retained one of those actions in the District of New Jersey and transferred the others to nine other districts. Plaintiff thereafter applied to the Judicial Panel on Multidistrict Litigation for pre-trial consolidation pursuant to 28 U.S.C. § 1407(a). The Panel transferred the actions based upon Count I to the District of Massachusetts for consolidated pre-trial proceedings. *In re Kauffman Mutual Fund Actions*, 337 F. Supp. 1337 (J.P.M.L. 1972).

B. Action of the District Court and Court of Appeals on the Rule 23.1 Motions

Pursuant to a pre-trial order, defendants promptly brought on in the District of Massachusetts the Rule 23.1 motions, which had been held in abeyance by the District

Court in New Jersey, and two other motions.[5] The motions now before this Court sought dismissal of the complaint for failure to make a demand upon either (a) the directors of each of the four Kauffman funds (the "director demand motion") or (b) the shareholders of the two Massachusetts Kauffman funds (the "shareholder demand motion"). (Resp. App. 16a-17a; Pet. App. A25).

Plaintiff filed a lengthy affidavit in opposition to these motions. On the director demand issue he made no attempt to supplement his complaint; on the shareholder demand issue he contented himself with statements as to the number of shareholders in the Massachusetts Kauffman funds. Defendants filed reply affidavits setting forth, as of the date of filing of the complaint, the number and identities of the directors of each of the Kauffman funds, specifying those who were at that time unaffiliated within the meaning of § 2(a)(3) of the Act, 15 U.S.C. § 80a-2(a)(3). (Resp. App. 18a-27a).

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[5] The other two motions — a motion to dismiss because of plaintiff's inability to provide fair representation and a waiver motion — were denied by the District Court. Plaintiff's complaint, as originally filed, sought monetary damages from the very funds on whose behalf he was purporting to sue. Confronted with charges of disabling conflicts of interests on the initial set of motions before the District Court of New Jersey, he "relinquished any claim for monetary damages against the funds." *Kauffman v. The Dreyfus Fund, Inc.*, 434 F.2d 727, 737 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). The fair representation motion before the District Court of Massachusetts asserted that this relinquishment was undertaken simply to preserve plaintiff's own standing and emphasized his inability to represent fairly and adequately the interests he purported to represent. The waiver motion, filed by the 61 funds in which plaintiff owned no shares, asserted that those defendants were no longer proper parties to the action because of plaintiff's relinquishment and that the action should therefore be dismissed as to them.

Plaintiff filed no affidavit contesting any of the matters contained in these reply affidavits. At the argument on these motions he reasserted his reliance upon the sufficiency of his complaint.[6]

The District Court granted both the director demand and the shareholder demand motions, and dismissed the complaint without prejudice.[7] The District Court held that "[i]f Rule 23.1 is to be more than a nicety of pleading and is to safeguard corporations from abuse [citation omitted], it must mandate that there be some merit to allegations of 'futility' of demand", and found that plaintiff had "not sufficiently shown the merits of his allegations of futility." (Pet. App. A18). The District Court noted that the complaint failed to charge unaffiliated directors with specific misconduct and that a majority of each of the boards was unaffiliated at the time demand should have been made. Considering, among other things, the allegations of the complaint upon which plaintiff sought to rely and noting the statutory role of the unaffiliated directors of mutual funds and the presumption set forth in § 2(a)(9) of the Act, 15 U.S.C. § 80a-2(a)(9), the District Court held that the conclusory allegation of domination and control of the funds' direc-

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[6] The following colloquy occurred:

THE COURT: You are asking the Court then to look just to the face of the complaint?

MR. PITTINSKY: That is correct, your Honor.

THE COURT: And apply the basic rule that [the allegations] must be accepted as truthful for the purpose of these motions.

MR. PITTINSKY. That is correct, your Honor. . . .

THE COURT: You also represent that your complaint is sufficient in making the same allegation that you now argue?

MR. PITTINSKY: That is correct, your Honor. (Resp. App. 28a).

[7] Pet. App. A22; Resp. App. 29a-30a.

torates by the affiliated directors was insufficient under Rule 23.1 to demonstrate futility of demand. (Pet. App. A18-A19).

Plaintiff, again choosing to stand upon his complaint without seeking to amend, appealed to the First Circuit, which affirmed the judgment of the District Court upon the director demand motion. The Court of Appeals rested its decision on the grounds that (1) plaintiff's "allegation of domination and control [of the unaffiliated majority of the directors of each Kauffman fund], unsupported by underlying facts, does not satisfy the requirement of particularity" of Rule 23.1; (2) "the complaint does not allege that those who were unaffiliated directors at the time of suit participated" in the alleged conspiracy; and (3) even if the same unaffiliated directors at the time of suit had participated in the transactions complained of, "[a]pproval by the directors of action alleged to be injurious to the corporation is not sufficient to excuse demand . . . absent self-interest or other indication of bias." (Pet. App. A29-A32). In light of that resolution, the Court of Appeals found it unnecessary to reach the question whether the District Court had properly granted the shareholder demand motion.

Plaintiff filed a petition for rehearing and tendered an affidavit purporting to show that substantially all of the unaffiliated directors of the Kauffman funds at the time of commencement of the action had been in office for several years. That petition requested that the case be remanded to the District Court to permit the complaint to be amended in accordance with the proffered affidavit. The Court of Appeals accepted the affidavit for identification purposes only, and denied the petition in a Memorandum and Order which gave full consideration to each of plaintiff's arguments and requests. (Pet. App. A42-A44).

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision follows long-standing and controlling precedent, does not conflict with decisions of this Court or of any Court of Appeals, and does not present any issue worthy of review by this Court.

I. THE FIRST CIRCUIT CORRECTLY DECIDED THE DIRECTOR DEMAND ISSUE IN ACCORDANCE WITH CONTROLLING PRECEDENT.

Plaintiff is asking this Court to examine anew the allegations of his complaint despite the determinations by the Courts below that those allegations were insufficient to excuse a demand upon directors prior to the commencement of the original action. The decisions of the Courts below are supported by well-settled precedent. *E.g., Foss v. Harbottle,* 2 Hare 461, 67 Eng. Rep. 189 (Ch. 1843); *Dodge v. Woolsey,* 59 U.S. (18 How.) 331, 341-46 (1855); *MacDougall v. Gardiner,* L.R. 1 Ch. 13 (1875); *Hawes v. Oakland,* 104 U.S. 450 (1881); *Delaware & Hudson Co. v. Albany & S. R.R.,* 213 U.S. 435 (1909). The general rule was stated by the Court in *Hawes*:

> "[A derivative plaintiff must demonstrate that] the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; [or that] . . . the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity." 104 U.S. at 460.

The Court in *Hawes* further held that the "cause of failure [to induce corporate action] . . . should be stated with

particularity." *Id.* at 461. Rule 23.1 embodies this principle. *See* 3B J. Moore, Federal Practice ¶ 23.1.19 at 23.1-251 (2d ed. 1948).

This rule of pleading is based upon the reluctance of courts to interfere in the internal affairs of a corporation before all intracorporate remedies have been exhausted by the complaining shareholder. *See Hawes,* 104 U.S. at 460-61; Note, *Demand on Directors and Shareholders as a Prerequisite to Derivative Suit,* 73 Harv. L. Rev. 746, 748-49 (1960). The demand requirement has an additional purpose:

> "[R]emoval of the suit from the would-be plaintiff's exclusive control has the additional effect of eliminating the danger of a secret settlement between him and the alleged wrongdoers. Moreover, the mere possibility of such removal discourages one of the major abuses in the use of the derivative suit, namely, its employment as a device to enable plaintiff's counsel to earn substantial fees." *Id.* at 749 (Footnote omitted).[8]

In applying these fundamental principles the Court of Appeals relied on *Hawes, Delaware & Hudson* and such other cases as *Lucking v. Delano,* 117 F.2d 159, 160 (6th Cir. 1941), in which it was held that "[a] bare allegation of the futility of such a demand is not sufficient without allegations of fact showing how and why the demand would be futile." *Accord, Wathen v. Jackson Oil & Refining Co.,* 235 U.S. 635, 639-40 (1915); *Robison v. Caster,* 356 F.2d 924, 926-27 (7th Cir. 1966).

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[8] This latter rationale is highlighted by the fact that, as originally framed, plaintiff's complaint sought to force the Kauffman funds and 61 other funds to sue one another and nearly everyone else in the mutual fund industry except, notably, the unaffiliated directors of the various funds.

II. THE DECISION OF THE FIRST CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER COURTS OF APPEALS.

Plaintiff argues, erroneously, that the First Circuit reached a result that conflicts with specified decisions of this Court and various other Courts of Appeals. The cases which he cites in support of his contention are not in point. Plaintiff is actually asking this Court to overturn well-settled precedent embodied in the requirement of Rule 23.1 that demand be made on directors by a derivative plaintiff unless he can demonstrate with particularity sufficient excuse for failure to make the demand.

Plaintiff relies heavily on *Smith v. Sperling*, 354 U.S. 91 (1957). But the First Circuit recognized that that case involved the very different issue whether the corporate beneficiary of a derivative action is a real, or only a nominal, defendant for the purposes of determining diversity of citizenship. (Pet. App. A33 n.5)[9] As its opinion clearly states, this Court made no decision on the director demand requirement; moreover, it deferred to the lower court in making the necessary factual determination. 354 U.S. at 93-95.

Plaintiff also relies on *Cathedral Estates, Inc. v. Taft Realty Corp.*, 228 F.2d 85, 86 (2d Cir. 1955). There the holders of 92 per cent of the corporate stock — obviously sufficient to elect a majority of the board of directors — were named as defendants and alleged to have made a

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[9] This is made clear by *Swanson v. Traer*, 354 U.S. 114 (1957) (the companion case to *Smith v. Sperling*), in which the Court, after aligning the derivative corporation as a defendant for diversity purposes, remanded the case to the Court of Appeals for consideration of the director demand issue. The Court of Appeals then dismissed the complaint for failure to comply with the demand requirements. 249 F.2d 854 (7th Cir. 1957). *See Venner v. Great Northern Ry.*, 209 U.S. 24 (1908).

fraudulent conveyance to a corporation wholly owned by them. In *Delaware & Hudson Co. v. Albany & S.R.R.*, 213 U.S. 435, 450 (1909), the directors and officers of the alleged corporate wrongdoer constituted a majority of the directors of the derivative corporate defendant. In *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826, 829-30 & n.8 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964), the Court made an express finding that the derivative corporate defendant did not act in good faith in seeking to bar the derivative plaintiff from prosecuting his action. In *Liboff v. Wolfson*, 437 F.2d 121, 122 (5th Cir. 1971), all of the directors were named as defendants, and it was expressly admitted that the alleged principal wrongdoer controlled the board. In the other case cited by plaintiff in support of his contention of a conflict of decisions, all of the members of the board of directors were named as defendants. *Meltzer v. Atlantic Research Corp.*, 330 F.2d 946, 947-48 (4th Cir.), *cert. denied*, 379 U.S. 841 (1964). No such facts were alleged nor are they to be found in the present case. It has not been claimed (nor could it be) that the affiliated directors of the Kauffman funds — a minority of each of their respective boards — controlled sufficient stock to elect the boards of the Kauffman funds.

Moreover, the complaint does not allege any wrongdoing by the unaffiliated directors (*see* Compl. ¶¶ 28 & 30 at Pet. App. B8-B9), who at all relevant times comprised a majority of the boards of each of the Kauffman funds. (Pet. App. C1-C7; Resp. App. 18a-27a). Significantly, none of the unaffiliated directors has been named as a defendant, as a member of a class of defendants or as a co-conspirator. Rather, in conclusory fashion, plaintiff alleges that the boards of all 65 funds named as defendants are "dominated and controlled" by their respective advisers and certain of their affiliated directors. Judge Aldrich's analysis of para-

graphs 10, 22-25 and 27-30 of the complaint establishes the failure of those paragraphs to allege with sufficient particularity that the unaffiliated majority of any Kauffman fund was "controlled" by the affiliated minority. (Pet. App. A25-A29).

In an attempt to cure this insufficiency, plaintiff inaccurately asserts that his complaint alleges that all the members of the boards of directors participated in, approved of, and acquiesced in the claimed antitrust violations. (Pet. pp. 3-4, 17). The complaint, however, only makes such allegations concerning named defendants. (Compl. ¶ 30 at Pet. App. B9). None of the unaffiliated directors was named as a defendant or as a co-conspirator, nor was any such director included within any of the classes of defendants in this action. As found by the Court of Appeals:

> "Apart from [the conclusory allegation of] 'control,' only the affiliated directors — a minority of each board — are alleged to have 'acquiesced, encouraged, cooperated and assisted in the effectuation and maintenance' of the conspiracy. *The unaffiliated directors are not named as defendants, or even as the ones who approved the acts complained of.*" (Pet. App. A30) (Emphasis added).

"Various other corporations, individuals and entities", whose identities were allegedly "*presently unknown to plaintiff*", are also accused of having participated in the conspiracy. (Compl. ¶ 31 at Pet. App. B9-B10) (Emphasis added). However, the identity of the unaffiliated directors of the Kauffman funds was public information and was certainly known to plaintiff as a shareholder in these four funds. Had he intended to charge the unaffiliated directors with participation in this supposed conspiracy, it seems clear that he would have named them in the complaint.

Plaintiff also attempts to use *Smith v. Sperling*, 354 U.S. 91 (1957), for the proposition that the Kauffman funds'

procedural motions demonstrate "antagonism" sufficient to excuse the necessity of making demand. Even though demonstration of procedural antagonism may be sufficient under *Smith v. Sperling* to support diversity jurisdiction, its acceptance for purposes of Rule 23.1 would render the demand requirement a nullity. If the corporation on whose behalf the suit was brought did not raise the question of failure to make demand, that would be the end of the matter. If it did raise the question, the plaintiff could seize upon that very action to excuse his failure to have made demand. Such a result is totally inconsistent with Rule 23.1, for it would permit every derivative plaintiff to ignore the demand requirement with impunity. As Judge Aldrich pointed out, plaintiff's argument for excusing demand is "classic bootstrap." (Pet. App. A30).[10]

III. NO IMPORTANT ISSUES ARE RAISED BY THE DECISIONS BELOW.

A. Both Lower Courts Correctly Concluded That Plaintiff Failed to Plead With Sufficient Particularity Reasons For Excusing Demand on Directors. This Court Should Not Review That Finding.

In this case, both the District Court and the Court of Appeals applied to the complaint accepted rules and found that the allegations purporting to show reasons for a failure to make demand were inadequate. This issue is not

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[10] Similarly, the fact that plaintiff was not afforded discovery on the issue of demand (*e.g.*, Pet. pp. 8-9), should be given no weight whatsoever. In the Courts below, he insisted that he was relying solely on the allegations of his complaint. (See pp. 7-9 and footnote 6, *supra.*) In any event, as Judge Aldrich recognized,

> "[T]he stockholder may not plead in general terms, hoping that, by discovery or otherwise, he can later establish a case. Indeed, if the requirement could be met otherwise, it would be meaningless." (Pet. App. A29).

one of great moment or precedential value. It is simply a pleading question which this Court has indicated should be entrusted to the lower courts. *See, e.g., Swanson v. Traer,* 354 U.S. 114 (1957) (remand for a determination whether the complaint justified failure to make demand). *See also* 3B J. Moore, Federal Practice ¶ 23.1.19 at 23.1-254 (2d ed. 1948). The detailed review afforded this complaint by the two Courts below, both reaching the same result, is more than sufficient. *Cf. Berenyi v. Immigration Dir.,* 385 U.S. 630, 635 (1967); *United States v. Dickinson,* 331 U.S. 745, 749 (1947). In essence all the Petition seeks is to have this Court rummage once again through the twice-rejected allegations of plaintiff's conclusory and plainly defective complaint.

B. The District Court's Additional Holding on Shareholder Demand Does Not Present an Appropriate Question For Review.

One half of plaintiff's argument in the Petition is devoted to an issue which the Court of Appeals properly found unnecessary to reach — the effect of plaintiff's failure to comply with the shareholder demand requirements of Rule 23.1. The First Circuit's holding on the issue of director demand resulted in the dismissal of the entire case. If this Court concludes that the director demand issue should not be reviewed, it would be inappropriate to grant review on the shareholder demand issue — an alternative holding of the District Court — since a determination of that issue would not change the result in the case: the complaint would still stand dismissed. To review the shareholder demand question under such circumstances would be tantamount to rendering an advisory opinion on a moot question. *See, e.g., Barr v. Matteo,* 335 U.S. 171, 172 (1957).

Both Fidelity Trend Fund, Inc., and The Putnam Growth Fund are organized under Massachusetts law. It is well-settled under Massachusetts law that so long as a majority of the shareholders are disinterested they must be given an opportunity to decide whether, in their sound business judgment, it is in the interest of the corporation to proceed with a derivative suit. *S. Solomont & Sons Trust, Inc. v. New England Theatres Operating Corp.*, 326 Mass. 99, 112-14, 93 N.E.2d 241, 248 (1950); *Bartlett v. New York, N.H. & H.R.R.*, 221 Mass. 530, 532-33, 109 N.E. 452, 453-54 (1915). The rule applies with respect to charges that the federal antitrust laws have been violated as well as to all other corporate causes of action. *Solomont*, 326 Mass. at 104-05, 93 N.E.2d at 244.

The District Court found that under the shareholder demand provisions of Rule 23.1 these principles of Massachusetts law were controlling. In so doing, it concluded that the law of the state of incorporation determines the extent to which it is "necessary" (within the meaning of the Rule) for a plaintiff to make demand on his fellow shareholders, when the applicable federal statute (in this case the Sherman Act) is silent.

The District Court acted in accordance with the controlling precedent of *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 264 (1917), in which this Court specifically declared its concern that intracorporate remedies be observed in Sherman Act cases:

> "No application appears to have been made to the stockholders as a body or indeed to any other stockholders individually; nor does it appear that there was no opportunity to make it, and no special facts are shown which render such application unnecessary. For aught that appears, the course pursued by the directors has the approval of all the stockholders except the

> plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation." [11]

Nothing turns on plaintiff's argument that federal law controls the shareholder demand issue since, even if federal law does apply, his complaint plainly fails to meet the federal shareholder demand requirement. *Hawes v. Oakland*, 104 U.S. 450, 461 (1881), holds that a shareholder who intends to bring a derivative suit

> "must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

See United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 264 (1917). *Swanson v. Traer*, 354 U.S. 114, 116-17 (1957), makes it clear that any "federal" demand requirement is that set forth in *Hawes*. *See also Quirke v. St. Louis-S.F. Ry.*, 277 F.2d 705, 707-08 (8th Cir.), *cert. denied*, 363 U.S. 845 (1960). Plaintiff made not the slightest effort to obtain shareholder action and his complaint is devoid of any justification for his failure to do so.

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[11] Plaintiff's use of ellipsis and italicization (Pet. p. 30) distorts the rule of *United Copper*. As that case makes clear, demand must be made separately on the directors and on the shareholders unless plaintiff alleges with sufficient particularity an excuse for failure to make demand upon both directors and shareholders. Moreover, plaintiff cites *Levitt v. Johnson*, 334 F.2d 815 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965), without making any reference to footnote 5 of that decision. There the First Circuit recognized the applicability of the rule of *United Copper* to antitrust cases. 334 F.2d at 820 n.5.

C. Refusal By the Court of Appeals to Grant Plaintiff Leave to File an Affidavit or to Amend His Complaint Was Within the Court's Discretion.

1. The facts which plaintiff sought to assert would not cure the defects in his complaint.

In support of his petition for rehearing by the First Circuit, plaintiff tendered his affidavit and sought to amend his complaint in a belated attempt to state no more than that the unaffiliated directors of the Kauffman funds at the time he filed his complaint were substantially the same as those in office at the time of the alleged wrongdoing. This assertion would not, as the First Circuit observed (Pet. App. A43), have cured his inability to plead, as required by *Hawes v. Oakland,* 104 U.S. 450, 460 (1881), that the unaffiliated directors were biased or acting in their own self-interest or in a manner destructive of the corporation or of the rights of the other shareholders. The First Circuit stated:

> "Even if we could assume that there had never been a change in the complement of the boards of directors, and that those who were the directors at the time of the suit had approved of the transactions presently attacked, it would not follow that mere prior participation would excuse making the demand. Where mere approval of the corporate action, absent self-interest or other indication of bias, is the sole basis for establishing the directors' 'wrongdoing' and hence for excusing demand on them, plaintiff's suit should ordinarily be dismissed." (Pet. App. A31-A32).

Plaintiff's attempt to overturn the dismissal of his complaint based on the refusal of the Court of Appeals to accept his affidavit or to remand with leave to amend is not germane since both the District Court and the Court of Appeals would, in any event, have reached the same decision. *See* 3 J. Moore, Federal Practice ¶¶ 15.08[4] at 905 & 15.09 at 958-59 (2d ed. 1948).

2. The First Circuit's refusal on rehearing to consider new factual matters presented by plaintiff was correct and constituted a sound exercise of its discretion.

The action of the First Circuit in rejecting plaintiff's affidavit and denying leave to amend was within its discretion and in accordance with settled legal principles. Plaintiff adamantly insisted throughout these lengthy proceedings upon the sufficiency of his complaint. See pp. 7-9 and footnote 6, *supra*. There was no abuse of discretion when the Court of Appeals concluded plaintiff should be bound by the determination of the District Court that demand was necessary before he could proceed further.

The power of a court of appeals to modify or enlarge the record is defined by Fed. R. App. P. 10(e). That rule permits the district court or the court of appeals to supply or correct "anything material . . . omitted . . . by error or accident or . . . misstated . . . ." Plaintiff cannot claim that his proffered affidavit was omitted from the record by error or accident or that the allegations of his complaint were misstated. Several courts have held that the further provision in Fed. R. App. P. 10(e) that "[a]ll other questions as to the form and content of the record shall be presented to the court of appeals" does not permit additions to the record of any material not before the district court. *E.g., United States ex rel. Kellogg v. McBee*, 452 F.2d 134, 137 (7th Cir. 1971); *Munich v. United States*, 330 F.2d 774, 776 (9th Cir. 1964).

In any event, whatever power a court of appeals has to allow additions to the record of material not before the district court is plainly discretionary. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331-32 (1971) (motion before trial judge to reopen record to admit additional proof "is addressed to his sound discretion").

Moreover, here the affidavit was not tendered until after the Court of Appeals' adverse decision. In these circumstances this Court should not be asked to utilize its certiorari power to review an exercise of discretion.

The First Circuit's concomitant refusal on well-articulated grounds to grant leave to amend was also proper. *Cf. Foman v. Davis,* 371 U.S. 178, 182 (1962).[12] Plaintiff made no attempt to amend his complaint after he had been put on notice at the outset of the action of defendants' intention to bring on Rule 23.1 motions. Nor did he attempt to amend his complaint after the decision of the Third Circuit limiting the action to a derivative suit on behalf of the Kauffman funds. Finally, he made no attempt to amend his complaint after the decision of the District Court on the present motion.[13] Indeed, plaintiff repeatedly insisted that he was relying on the allegations of his complaint as filed.

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[12] As Judge Aldrich stated:

> "[We are not] moved at this time to permit an amendment to the complaint. Surely plaintiff must have realized his obligation to show an excuse extending to the majority of the Board. *Cathedral Estates v. Taft Realty Corp.,* 2 Cir., 1955, 228 F.2d 85. Defendants' brief abundantly pointed out that the unaffiliated directors constituted the majority of each board, and there was ample time for plaintiff to make its now proffered assertion. This is particularly so as to a plaintiff who complains that the case has been vigorously defended for four years." (Pet. App. A43) (Footnote omitted).

[13] Plaintiff's suggestion (Pet. p. 18) that the District Court's opinion made amendment impossible is based on a distorted reading of that decision. The District Court did not hold that the statutory presumption contained in § 2(a)(9) of the Act conclusively determined the issue of director demand. It simply referred to that presumption in the context of emphasizing the basic requirement of Rule 23.1 that facts relating to the question of director demand be pleaded *"with particularity."* (Pet. App. A18) (Emphasis added).

In cases where an appellant raises the issue of amendment for the first time after electing to appeal and losing, it has been held that no amendment will be considered. *See 222 East Chestnut St. Corp. v. Lakefront Realty Corp.*, 256 F.2d 513, 515 (7th Cir.), *cert. denied*, 358 U.S. 907 (1958); *Feddersen Motors, Inc. v. Ward*, 180 F.2d 519, 523 (10th Cir. 1950).[14] This rule is appropriate to prevent unsuccessful suitors from barraging courts of appeals with requests for advisory opinions on the sufficiency of their pleadings, secure in the belief that an adverse decision would do no more than require them to amend their pleadings. Its application is especially appropriate here since plaintiff must have

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[14] The only cases concerning amendment cited by plaintiff (Pet. 20) involved situations where the appellants had sought and been denied leave to amend *in the District Court*. *Foman v. Davis*, 371 U.S. 178, 179 (1962) and *Ballou v. General Electric Co.*, 393 F.2d 398, 399 (1st Cir. 1968). That important distinction explains the courts' language in those cases concerning liberality of amendment. As Judge Aldrich stated:

> "Plaintiff's citation of [*Ballou*] in which we recognized there would be a right to amend on a quite different set of facts does not mean that the right exists at all stages of a case or *regardless of the type of pleading deficiency*." (Pet. App. A43 n.1) (Emphasis added).

The few other cases which have permitted post-appeal amendment turn on facts not present in this case. For example, the Court of Appeals was not faced with a curable defect in the allegations establishing diversity jurisdiction, made correctable by 28 U.S.C. § 1653, *Brooks v. Yawkey*, 200 F.2d 663, 664 (1st Cir. 1953); nor with the possibility of affirming a dismissal on a second issue, not passed upon below, on which the District Court might have permitted amendment, *Klebanow v. New York Produce Exchange*, 344 F.2d 294, 299-300 (2d Cir. 1965); nor with an order of dismissal in the District Court which failed to state its ground and, therefore, left the plaintiff unable to offer a correcting amendment, *Griffin v. Locke*, 286 F.2d 514, 515 (9th Cir. 1961); nor did the Court of Appeals affirm the decision of the District Court for reasons different from those relied on by the District Court, as to which the plaintiff might have offered an amendment which would have cured the defects in his complaint, *Oil Workers Union v. Delta Refining Co.*, 277 F.2d 694, 696-98 (6th Cir. 1960).

realized from the outset his obligation to plead with particularity an excuse running to a majority of the boards of directors of the Kauffman funds. *See Moviecolor, Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 88 (2d Cir. 1961).

In any event, the Court of Appeals' decision on amendment, like its decision on the affidavit, is one committed to its discretion. It is not appropriate to ask this Court to review the manner in which that discretion was exercised in this instance. *See Sawyer v. Piper*, 189 U.S. 154, 157 (1903). As the First Circuit recognized, plaintiff in this case has simply been guilty of undue delay. (Pet. App. A43). *Foman v. Davis*, 371 U.S. at 182.

D. The Decision Below Does Not Impair Private Enforcement of the Antitrust Laws.

Plaintiff extravagantly contends that the First Circuit's decision in this case "will immunize the mutual fund industry from the salutary proscriptions of the antitrust and securities laws", and that he should accordingly receive this Court's dispensation from well-established procedural rules so that *he* can proceed with *his* alleged derivative antitrust claims in spite of fatal flaws in his complaint. (Pet. p. 14). This contention is without merit.[15]

Plaintiff is in fact urging that the time-tested procedural requirements of Rule 23.1 be held inapplicable to antitrust

[15] Neither the selective quotations from the testimony of Hamer H. Budge (Pet. pp. 13-14) nor the legislative history of the 1970 amendments to the Act reflect any suggestion by Congress or the SEC of antitrust violations. Indeed, the Commission in its study of the industry concluded "that on the whole investment companies have been diligently managed by competent persons and that the general record of the industry is one of which it can be justly proud." SEC, *Public Policy Implications of Investment Company Growth*, H.R. Rep. No. 2337, 89th Cong., 2d Sess. viii (1966).

cases. But this Court has expressly held that the demand requirement incident to the bringing of shareholder derivative suits is applicable to such cases. *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263-64 (1917). *See also Ash v. International Business Machines Corp.*, 353 F.2d 491, 492-93 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966). The First Circuit held in accordance with *United Copper* that the procedural requirements incident to a derivative suit instituted under Rule 23.1 are as applicable to an action instituted under the antitrust laws as they are to other derivative actions brought in the federal courts.[16]

If in this instance plaintiff's ability to enforce the antitrust laws has been impaired, he has only himself to blame. As pointed out by the Court of Appeals:

> "We recognize the social desirability of bona fide, well founded minority suits. We also recognize the tremendous waste involved in suits that are not well founded. We do not accept the dictum in *deHaas v. Empire Petroleum Co.*, 10 Cir., 1970, 435 F.2d 1223, at 1228, that '[c]ourts have generally been lenient in excusing demand' if it is to be applied to allegations as substantively deficient as the present. Such easy remarks overlook the requirement that the directors' 'antagonism . . . be unmistakable.' *Delaware & Hudson Co. v. Albany R.R.* [213 U.S. 435 (1909)]. If, as plaintiff suggests, this frustrates his ability to prosecute a worthwhile suit, the answer is that he was not entitled to bring it." (Pet. App. A35).

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[16] Nor are traditional rules suspended, as urged by plaintiff, simply because the derivative defendants happen to be mutual funds. The Third Circuit has already held in this case that "the public policy based strictures" on derivative actions apply to antitrust suits brought on behalf of mutual funds just as they do with respect to any other corporation. *Kauffman v. The Dreyfus Fund, Inc.*, 434 F.2d 727, 732-34, 735 n.3 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

MDL-78-1
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MDL-78-5
(District of Columbia)

JOHN A. BECK, ESQ. Frost, Towers, Hayes & Beck Southern Building Washington, D. C. 20005 (202) 393-5360	*Washington Mutual Investors Fund, Inc.* *Johnston, Lemon & Co.* *James H. Lemon*

MDL-78-6
(District of Maryland)

STANLEY J. FRIEDMAN, ESQ. Shereff, Friedman, Hoffman & Goodman 919 Third Avenue New York, New York 10022 (212) 758-9500	*T. Rowe Price Growth Stock Fund, Inc.* *Rowe Price New Horizons Fund, Inc.*
DANIEL A. POLLACK, ESQ. Pollack & Singer 61 Broadway New York, New York 10006 (212) 952-0330	*T. Rowe Price Associates, Inc.* *Charles W. Schaeffer* *Rowe Price Management Company, Inc.* *T. Rowe Price*

MDL-78-7
(District of Minnesota)

A. VERNON CARNAHAN, ESQ. Donovan, Leisure, Newton & Irvine 30 Rockefeller Plaza New York, New York 10020 (212) 489-4100	*Investors Diversified Services, Inc.* *Stuart F. Silloway*

MDL-78-8
(Central District of California)

Attorneys	Respondents
WILLIAM W. VAUGHN, ESQ. O'Melveny & Myers 611 West Sixth Street Los Angeles, California 90017 (213) 620-1120	*American Mutual Fund, Inc.*
CARL J. SCHUCK, ESQ. Overton, Lyman & Prince 550 South Flower Street Los Angeles, California 90017 (213) 485-8500	*The Investment Company of America*
MAX L. GILLAM, ESQ. PHILIP F. BELLEVILLE, ESQ. Latham & Watkins 555 South Flower Street Los Angeles, California 90017 (213) 485-1234	*Capital Research and Management Company* *Jonathan B. Lovelace*

MDL-78-9
(Northern District of California)

ROBERT D. RAVEN, ESQ. Morrison, Foerster, Holloway, Clinton & Clark Crocker Plaza San Francisco, California 94104 (415) 986-1310	*American Express Investment Fund, Inc.*
RICHARD MURRAY, ESQ. McCutchen, Doyle, Brown & Enersen 601 California Street San Francisco, California 94108 (415) 981-3400	*American Express Investment Management Company* *Fred H. Merrill*

MDL-78-10
(District of New Jersey)

CORNELIUS J. MOYNIHAN, JR., ESQ. Peabody, Brown, Rowley & Storey One Boston Place Boston, Massachusetts 02108 (617) 723-8700	*Anchor Growth Fund, Inc. (formerly Diversified Growth Stock Fund, Inc.)* *Anchor Income Fund, Inc. (formerly Diversified Investment Fund)* *Fundamental Investors, Inc.*

MDL-78-10
(Cont'd.)

Attorneys	Respondents
DANIEL A. POLLACK, ESQ. Pollack & Singer 61 Broadway New York, New York 10006 (212) 952-0330	*Anchor Corporation* *John R. Haire*
HOWARD F. ORDMAN, ESQ. Putney, Twombly, Hall & Hirson 250 Park Avenue New York, New York 10017 (212) 661-8700	*Group Securities, Inc.*
RALPH M. CARSON, ESQ. RICHARD E. NOLAN, ESQ. FRANK S. MOSELEY, ESQ. Davis, Polk & Wardwell 1 Chase Manhattan Plaza New York, New York 10005 (212) 422-3400	*Investors Mutual, Inc.* *Investors Stock Fund, Inc.* *Investors Variable Payment Fu* *Inc.*

Certificate of Service

I, Ansel B. Chaplin, a member of the Bar of the Supreme Court of the United States, hereby certify that on this 31st day of August, 1973, Joint Brief in Opposition to Petition for Writ of Certiorari was served upon petitioner on behalf of all of the respondents in this proceeding whose names have been subscribed to pages 25-34 of that document, by mailing three copies of the same, first class, postage prepaid, to each of the following attorneys:

William T. Coleman, Jr., Esq.
2600 The Fidelity Building
Philadelphia, Pennsylvania 19109

Bruce W. Kauffman, Esq.
2600 The Fidelity Building
Philadelphia, Pennsylvania 19109

David H. Pittinsky, Esq.
2600 The Fidelity Building
Philadelphia, Pennsylvania 19109

Harold E. Kohn, Esq.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103

Aaron M. Fine, Esq.
1200 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103

Joseph B. Kauffman, Esq.
1421 Atlantic Avenue
Atlantic City, New Jersey 08401

I further certify that all parties required to be served have been served.

/s/ ANSEL B. CHAPLIN
ANSEL B. CHAPLIN
82 Devonshire Street
Boston, Massachusetts 02109

Co-counsel for Respondents
Fidelity Management & Research Company, Inc.
Edward C. Johnson, 2d

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSEPH B. KAUFFMAN, Plaintiff, —against— THE DREYFUS FUND, INC., et al., Defendants.	Civil Action No. 1348-68

Proposed Agenda for Conference of

April 18, 1969

Pursuant to the Court's direction at the conference of February 21, 1969, the following agenda and attached papers have been circulated among defense counsel, and are submitted in connection with the conference scheduled for April 18, 1969. This submission is without prejudice to any defendant's right to suggest other items for the Court's consideration on April 18th.

1. Discussion of the entry of an Order providing that neither this submission nor the participation by any defendant in any conference or other proceedings in this Court shall be deemed a waiver of the right of any defendant to plead or otherwise move with respect to jurisdiction, venue, process or service; and providing further that participation in any motion by any defendant shall not be deemed a

waiver of any rights of such defendant which may be raised by one or more subsequent motions.

2. Further identification of all counsel of record for each named defendant.

3. Report and discussion concerning the implementation of the Court's suggestion at the conference of February 21st that defense counsel consider the formation of a Steering Committee. For the convenience of the Court, the membership, purposes and functions of such a Steering Committee established by defendants are set forth in Attachment "A".

4. Scheduling of preliminary motions listed on Attachment "B".

5. Consideration of previous suggestion that Court and counsel set aside a certain day or days in every month for the handling of matters requiring the Court's attention.

6. Continued stay of all proceedings not specifically scheduled by the Court.

Dated: Camden, New Jersey
April 8, 1969

[Names of counsel omitted]

ATTACHMENT "A"

[Omitted]

Proposed Agenda for Conference of April 18, 1969

ATTACHMENT "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Caption Omitted]

List of Preliminary Motions

The following list has been prepared and circulated among defense counsel to assist the Court in the scheduling of preliminary motions, and describes in a general, rather than a definitive manner, the motions which are now contemplated by one or more defendants.

Closely related motions have been grouped together for simultaneous filing and three groups have been arranged in sequence. These groups should be filed and taken up in series as set forth herein, since the disposition of one or more motions proposed for early filing should make it unnecessary to consider one or more of the motions proposed for later submission.

With the exception of the first group of motions, all groups are tentative, and subsequent developments may dictate revision. Accordingly, the list is submitted without prejudice to the rights of any defendant to file any appropriate additional motions upon proper notice, and without prejudice to the rights of any one or more defendants to determine not to participate in any motion, or to withdraw any motion altogether.

In order to proceed in the manner suggested, defendants request the Court to enter an Order providing: (i) that the

filing of motions according to the schedule established by the Court shall not operate to waive or bar, under Rules 12(g) and 12(h) of the Federal Rules of Civil Procedure, any defense or objection; and (ii) that the participation by any defendant in any motion shall not be deemed a waiver of any right of such defendant which may be raised by one or more subsequent motions.

A. FIRST GROUP:
MOTIONS ADDRESSED TO CAPACITY

The first group of five motions raises fundamental legal questions designed to determine the capacity or capacities in which plaintiff may sue, and the capacities in which defendants may be sued. These motions should be determined before there are any further proceedings in the case.

MOTION No. 1: *To dismiss the complaint by reason of plaintiff's inability to provide fair and adequate representation.*

The complaint places the mutual funds on both sides of the case — they are sued both as nominal defendants upon whose behalf derivative claims are asserted and damages are sought, and as actual defendants who allegedly have participated in the unlawful conduct complained of. As a result plaintiff and his attorney purport to protect the interests of the very funds from which they seek monetary damages. Defendants, accordingly, will move to dismiss the action on the grounds that plaintiff cannot fairly and adequately represent either the interests of the shareholders in enforcing the rights of the mutual funds, or the interests of the funds themselves.

Proposed Agenda for Conference of April 18, 1969

MOTION No. 2: *To dismiss all claims on behalf of individual shareholders.*

In addition to suing in a derivative capacity to assert corporate causes of action allegedly belonging to defendant mutual funds, plaintiff also purports to sue in a representative capacity to assert causes of action allegedly belonging to himself and all other shareholders of such funds individually. This motion will raise the fundamental legal question whether the injury alleged in the complaint vests any individual shareholder with a personal cause of action for damages, or whether the alleged injury gives rise only to corporate causes of action which belong solely and exclusively to the various defendant mutual funds.

In defendants' view the purported injuries complained of have been sustained, if at all, only by the mutual funds, and they alone are possessed of any causes of action for recovery. Accordingly, defendants will move to dismiss all claims upon behalf of individual shareholders. If this motion is granted, plaintiff will be restricted to suing solely in a derivative capacity for the assertion of corporate claims on behalf of the mutual funds.

MOTION No. 3: *To dismiss all claims asserted derivatively on behalf of funds in which plaintiff is not a shareholder.*

Plaintiff purports to sue derivatively on behalf of all sixty-five defendant mutual funds, although he alleges himself to be a shareholder in only four. In defendants' view, Rule 23.1 of the Federal Rules of Civil Procedure explicitly precludes plaintiff from derivatively asserting corporate

claims on behalf of funds in which he is not a shareholder, and an appropriate motion for dismissal will be made.

If granted, this motion would restrict plaintiff to the assertion of derivative claims on behalf of the four funds in which he owns shares.

MOTION No. 4: *To dismiss all conspiracy claims under Counts II and III.*

Under Counts II and III each defendant is sued in two capacities: (i) as an individual whose conduct has allegedly violated the Securities Exchange Act, the Investment Company Act and the Investment Advisers Act; and (ii) as a co-conspirator who has aided and abetted such violations by each of the other defendants. This motion will raise the question as to whether, under the statutes alleged, there is a cause of action for conspiracy.

Defendants are of the view that even if a remedy may be implied under the federal securities laws against any person who has breached a duty created by those statutes and owing to plaintiff or to those whose interests plaintiff may properly represent, no such remedy may be implied as against any person who does not stand in such a relationship. Accordingly, defendants will move to dismiss the conspiracy claims in Counts II and III for lack of subject matter jurisdiction, and failure to state a claim.

MOTION No. 5: *To dismiss representative claims on behalf of shareholders of funds in which plaintiff is not a shareholder.*

Should the Court determine that the complaint states individual or representative claims, defendants will move to

dismiss all representative claims asserted on behalf of shareholders of the 61 mutual funds in which plaintiff is not himself a shareholder. In defendants' view, as a matter of law, a *non*-shareholder lacks standing to sue on behalf of shareholders.

SUMMARY: If the case is dismissed on the grounds set forth in Motion No. 1, all other motions will become moot. If Motion No. 1 is denied, but the other motions presented in this group are granted, the action will be reduced to a derivative suit on behalf of the four funds in which plaintiff claims to be a shareholder (or at most a derivative suit on behalf of such funds and a representative suit on behalf of the shareholders of such funds) against all defendants under Count 1, and against the defendants owing a statutory duty to those four funds under Counts II and III.

B. SECOND GROUP: MOTIONS ADDRESSED TO PLAINTIFF'S COMPLIANCE WITH STATUTORY REQUIREMENTS AND RELATED MOTIONS

After decision of the first group of motions has settled the basic structure of the case, the second group of motions will (if necessary) challenge the continuation of the action against some or all of the remaining defendants.

Motion No. 6: *Motion challenging the foundation of the complaint.*

The Federal Rules of Civil Procedure require that there be sufficient foundation for the commencement of any action in a Federal District Court. This motion will challenge the

basis for the allegations in the complaint with respect to some or all of the defendants; if it is determined to be insufficient dismissal will be moved.

MOTION No. 7: *To dismiss remaining derivative claims for failure to comply with the demand requirements.*

Rule 23.1 FRCP requires a shareholder bringing suit derivatively on behalf of his corporation either to allege that unsuccessful demand was made upon the directors (and, if necessary, upon the shareholders) to assert the corporate claim, or to allege "with particularity" the reasons for his failure to make such demands. Motion No. 7 will challenge the sufficiency of the complaint in this respect. If the motion is granted all remaining derivative claims under all Counts will be eliminated from the case.

MOTION No. 8: *To dismiss Count I as to certain individual defendants for lack of personal jurisdiction.*

Service of process upon individual defendants has been attempted throughout the nation, and this motion will challenge the sufficiency of such service to confer jurisdiction over the person of individuals not served within the District of New Jersey.

Assuming proper venue, nationwide service upon individuals may be authorized under the statutes alleged in Counts II and III, but it is not authorized with respect to Count I. Accordingly, this motion will seek dismissal of Count I with respect to any individual not served within this District. The granting of the motion would reduce the number of defendants remaining subject to the antitrust

conspiracy charge, and would remove from the case entirely any moving defendant with respect to whom Counts II and III have been dismissed by prior motion and Order.

MOTION No. 9: *Other motions raising questions of service of process, jurisdiction or venue.*

All other appropriate motions relating to service of process, jurisdiction and venue will be included in the second group of motions. Since these motions will depend in part upon the particular circumstances or methods of doing business of each of the defendants, whether individual or corporate, it is not practicable to attempt to complete enumeration at this time.

MOTION No. 10: *To dismiss or stay on the basis of other litigation.*

Various defendants sued in this action have previously been or are currently involved in litigation raising questions which are also presented in this case. This motion will raise certain questions as to the impact of such other litigation (*e.g.*, collateral estoppel, the effect of stay orders entered therein by other District Courts, etc.) upon the continuation of all or any part of the present action.

C. THIRD GROUP: CLASS ACTION AND OTHER PRELIMINARY MOTIONS

After the first two groups of motions addressed to the major function of paring down the parties and issues in the case have been decided, the third group of motions will deal

with remaining issues, if any, related to the ultimate form of the action.

MOTION No. 11: *To dismiss claims against unnamed defendants.*

The complaint purports to allege causes of action not only against the named defendants but also against classes represented by such named defendants as follows:

(a) each named defendant mutual fund "as a representative on behalf of all other externally managed mutual funds affiliated therewith or related thereto";

(b) each named defendant investment adviser "as a representative on behalf of all other investment advisers affiliated therewith or related thereto"; and

(c) each named individual defendant "as a representative of all other . . . directors similarly situated."

This motion will attack the appropriateness of the defendant classes — in particular, but without limitation, the appropriateness of defendant classes of "conspirators". If granted, this motion will eliminate the unnamed defendants from the case.

MOTION No. 12: *To determine whether the case may be appropriately maintained as a class action.*

If decision on the first group of motions relating to the capacity in which plaintiff may sue has not precluded the possibility of a class action for the reasons upon which those motions are based, one or more motions based upon the requirements of Rule 23 will be required to determine

whether all or any portion of plaintiff's case is suitable for maintenance on a class basis against any or all defendants.

These motions may result in dismissal of the class action under any of the standards set forth in the Rule.

MOTION No. 13: *To strike impertinent or scandalous matter.*

The complaint contains certain impertinent or scandalous matter, such as the designation of the individual defendants as "self-dealing directors". Defendants will move to strike such allegations.

MOTION No. 14: *To require plaintiff to post security for expenses.*

With the filing of a broad and far-reaching complaint, the single plaintiff has exposed 141 named defendants to substantial expense. Defendants should be assured that in the event they prevail, those expenses can be recovered from plaintiff, and a motion will be made for the posting of security in an appropriate amount.

MOTION No. 15: *To dismiss demand for jury trial with respect to derivative claims.*

Derivative and class actions are equitable in nature, and accordingly defendants will move to strike the demand for jury trial with respect to all such claims.

D. FURTHER PRELIMINARY ACTION

At a subsequent stage of the proceedings it may be appropriate to have another pre-trial conference.

Dated: Camden, New Jersey
April 8, 1969

[Names of counsel omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Caption Omitted]

Notice of Motion

PLEASE TAKE NOTICE that the undersigned defendants will, on a date to be fixed by the Court, make motions for the following orders:

(1) Pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, dismissing the action on the grounds that, on the face of the Complaint, plaintiff does not fairly and adequately represent the interests of the funds or their shareholders;

(2) Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing all claims asserted individually, or representatively on behalf of individual shareholders, on the ground that all of the claims asserted are necessarily derivative in nature;

(3) Pursuant to Rules 12(b)(6), 23 and 23.1 of the Federal Rules of Civil Procedure, dismissing each of Counts I, II and III to the extent they seek relief (a) on behalf of funds of which plaintiff is not a shareholder, and (b) on behalf of shareholders of funds of which plaintiff is not a shareholder, on the ground that a party may not maintain an action on behalf of a corporation, or shareholders of a corporation unless he himself is a shareholder of that corporation;

(4) Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing Counts II and III for failure to state a claim upon which relief can be granted on the ground the conspiracy alleged therein does not constitute a violation of the statutes under which relief is sought;

Notice of Motion

(5) Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, dismissing the action on the ground that the Court does not have jurisdiction over the persons of defendants;

(6) Pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, dismissing the action on the ground that it was brought and is pending in the wrong district;

(7) Pursuant to Rule 12(b)(4) of the Federal Rules of Civil Procedure, dismissing the action on the ground of insufficiency of process;

(8) Pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure, dismissing the action on the ground of insufficiency of service of process;

(9) Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Complaint and each count thereof on the ground that it fails to state a claim upon which relief can be granted; and

(10) For such other and further relief as to the Court may be just and proper.

PLEASE TAKE FURTHER NOTICE that the defendants will make, on a date to be fixed by the Court, all other motions described as "Second Group" and "Third Group" in Attachment B to the "Proposed Agenda for Conference of April 18, 1969", heretofore filed herein.

[Names of counsel omitted]

DATED:
Camden, New Jersey
April 25, 1969.

Letter of Hon. Mitchell H. Cohen to counsel dated April 29, 1969

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
U. S. Courthouse
Camden, New Jersey 08101

April 29, 1969

Re: JOSEPH B. KAUFFMAN v. THE DREYFUS FUND, INC., ET AL.
Civil Action No. 1348-68

JAMES HUNTER, ESQUIRE
518 Market Street
Camden, New Jersey 08102

HAROLD E. KOHN, ESQUIRE
123 South Broad Street
Philadelphia, Penna. 19109

Gentlemen:

The Clerk of our Court has brought to my attention the filing of a Notice of Motions on Friday, April 25, 1969, in the above entitled cause.

In view of my heavily congested calendar, I am requesting that you brief the first 4 Motions only attacking the capacity of the plaintiff to sue and maintain his action. The Briefs are to be filed in accordance with the time schedule established at the informal conference held on Friday, April 18, 1969.

Letter of Hon. Mitchell H. Cohen to counsel dated April 29, 1969

After these Motions have been briefed, argued and determined, you will be further advised as to the time within which Briefs are to be filed in the remaining Motions.

Would you both be good enough to have copies made of this letter for distribution to the appropriate counsel?

Yours very sincerely,

/s/ MITCHELL H. COHEN
MITCHELL H. COHEN
Judge, U. S. District Court

MHC:R
cc: Clerk, U. S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted]

Motion of Defendants The Dreyfus Fund, Inc., Fidelity Trend Fund, Inc., Manhattan Fund, Inc. and The Putnam Growth Fund To Dismiss The Complaint

The above-named defendants move the court pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure:

1. To dismiss the complaint for failure to state a cause of action inasmuch as the complaint does not allege with particularity the efforts made by the plaintiff to obtain the action he desires from their directors or comparable authority and the reasons for his failure to obtain such action or his failure to make such efforts, as required in derivative actions by shareholders under Rule 23.1 of the Federal Rules of Civil Procedure.

2. In addition, The Putnam Growth Fund and Fidelity Trend Fund, Inc., move to dismiss the complaint as to them, on the ground that the plaintiff has failed to state a cause of action inasmuch as the complaint does not allege with

particularity the plaintiff's efforts to obtain the action he desires from their shareholders.

THE DREYFUS FUND, INC.
FIDELITY TREND FUND, INC.
MANHATTAN FUND, INC.
THE PUTNAM GROWTH FUND

By /s/ LAWRENCE T. PERERA
LAWRENCE T. PERERA
PALMER & DODGE
28 State Street
Boston, Mass. 02109 (227-4400)

Attorney for The Putnam Growth Fund and with permission on behalf of the others for purposes of this motion only.

ORAL ARGUMENT IS REQUESTED AND IT IS ESTIMATED THAT TWENTY MINUTES SHOULD BE SUFFICIENT FOR THE ABOVE-NAMED DEFENDANTS.

THE DEFENDANTS LISTED IN SCHEDULE A (ATTACHED) JOIN IN THIS MOTION.

[Schedule A omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted]

Affidavit of Richard M. Cutler

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK } ss.:

RICHARD M. CUTLER, being duly sworn, deposes and says:

1. I am clerk of the Putnam Growth Fund, a mutual fund wi offices at 265 Franklin Street, Boston, Massachusetts, named herein a a defendant.

I am personally familiar, by reason of my official duties, or ha made due and diligent inquiry with respect to the facts and inform tion hereinafter set forth and such facts and information are comple and accurate to the best of my knowledge and belief.

2. On December 18, 1968 the Trustees of the Putnam Grow Fund were as follows:

Name and Address	Occupation	Officer, Director Shareholder o Employee of The Putnam Management Company, Inc.
*Vannevar Bush 104 Marsh Street Belmont, Mass. 02178	Trustee of Carnegie Institution of Washington and Honorary Chairman and life member of the Corporation of Massachusetts Institute of Technology. Trustee of The George Putnam Fund of Boston, and director of Putnam Investors Fund, Inc., The Putnam Income Fund, Inc., Putnam Equities Fund, Inc. and Putnam Vista Fund, Inc.	No

COPY BOUND CLOSE IN CENTER

Affidavit of Richard M. Cutler

Name and Address	Occupation	Officer, Director Shareholder or Employee of The Putnam Management Company, Inc.
Charles Devens 1702 Canton Ave. Milton, Mass. 02186	Director of Development, Groton School. Trustee of The George Putnam Fund of Boston and director of Putnam Investors Fund, Inc. and The Putnam Income Fund, Inc. Also director of Northern Pacific Railway Company and trustee of The Provident Institution of Savings.	Yes
Robert H. Gardiner Gardiner, Maine 04345	President of Fiduciary Trust Company, Boston. Trustee of The George Putnam Fund of Boston and director of Putnam Investors Fund, Inc., The Putnam Income Fund, Inc., Putnam Duofund, Inc. and Putnam Vista Fund, Inc. Also Treasurer and Trustee of Radcliffe College.	No
William M. Hunt 270 Jerusalem Road Cohasset, Mass. 02025	Vice President and director of The Putnam Management Company, Inc. Also director of International Utilities Corp. and General Waterworks Corp., and Trustee and member of the Investment Committee of Brown University.	Yes
Louis J. Hunter 172 Beacon Street Boston, Mass. 02116	Owner of Louis J. Hunter Associates, which provides trustee and financial services to corporations and individuals. Trustee of The George Putnam Fund of Boston, and director of Putnam Investors Fund, Inc., The Putnam Income Fund, Inc., Putnam Duofund, Inc., Putnam Equities Fund, Inc. and Putnam Vista Fund, Inc. Also Treasurer and director of The Carter's Ink Company, Treasurer and Trustee of University Hospital, Inc. and Vice President and director of Alfran Co., Inc.	No

Affidavit of Richard M. Cutler

Name and Address	Occupation	Officer, Director, Shareholder or Employee of The Putnam Management Company, Inc.
*Donald J. Hurley 11 Aberdeen Road Weston, Mass. 02193	Partner of Goodwin, Procter & Hoar, counsellors at law. Trustee of The George Putnam Fund of Boston, and director of Putnam Investors Fund, Inc., The Putnam Income Fund, Inc., Putnam Duofund, Inc., Putnam Equities Fund, Inc. and Putnam Vista Fund, Inc. Also director of Boston Safe Deposit and Trust Company and of Stop & Shop, Inc., Trustee and member of the Board of Investment of Charlestown Savings Bank, and President, Committee of the Permanent Charity Fund, Inc., Boston.	No
George Putnam Proctor Street Manchester, Mass. 01944	Vice Chairman of the Trustees. President and director of The Putnam Management Company, Inc. Vice Chairman of the Trustees of The George Putnam Fund of Boston, and President and director of Putnam Investors Fund, Inc., The Putnam Income Fund, Inc., Putnam Duofund, Inc., Putnam Equities Fund, Inc. and Putnam Vista Fund, Inc. Also director of American Mutual Liability Insurance Co., Boston Safe Deposit and Trust Company, The Gorton Corporation and Package Machinery Company, Member of Board of Overseers, Harvard College and Trustee of Massachusetts General Hospital and Wellesley College.	Yes

Affidavit of Richard M. Cutler

Name and Address	Occupation	Officer, Director Shareholder or Employee of The Putnam Management Company, Inc.
Charles M. Werly King Caesar Road Duxbury, Mass. 02332	Chairman of the Trustees. Director of The Putnam Management Company, Inc. Chairman of the Trustees of The George Putnam Fund of Boston and Chairman of the Board of Directors of Putnam Investors Fund, Inc., The Putnam Income Fund, Inc., Putnam Duofund, Inc., Putnam Equities Fund, Inc. and Putnam Vista Fund, Inc. Also Trustee of Cornell University and of Charlestown Savings Bank.	Yes
*Howard W. Johnson 111 Memorial Drive Cambridge, Mass. 02178	President of Massachusetts Institute of Technology. Trustee of The George Putnam Fund of Boston, and director of Putnam Investors Fund, Inc. Also director of Federated Department Stores and Hitchiner Manufacturing Corp. and Chairman of the Board of Directors of the Federal Reserve Bank of Boston.	No

3. The Trustees whose names are marked by an asterisk (*) were not affiliated Directors within the meaning of Section 2(a)(3) of the Investment Company Act of 1940.

Dated: May 2, 1972

/s/ RICHARD M. CUTLER
RICHARD M. CUTLER, *Clerk*
The Putnam Management Company

Subscribed to and sworn before me this 2d day of May, 1972.

/s/ JEFFREY SWOPE
Notary Public
[NOTARY STAMP AND SEAL OMITTED]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted]

Affidavit in Support of Rule 12(b)(6) Motion

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LAWRENCE M. GREENE, being duly sworn, deposes and says:

1. I am Secretary of the Dreyfus Fund, Inc. ("Dreyfus Fund"), a corporation organized under the laws of Maryland with its principal place of business in the City, County, and State of New York and one of the defendants named herein. I make this affidavit in support of the motion by the Dreyfus Fund, Putnam Growth Fund, Manhattan Fund, Inc. and Fidelity Trend Fund, Inc. to dismiss the complaint on the ground that plaintiff, a shareholder in each of the defendants making this motion, has failed to meet the requirements set forth under Rule 23.1 of the Federal Rules of Civil Procedure.

2. On December 18, 1968, the Board of Directors of the Dreyfus Fund were:

JACK J. DREYFUS, JR.
LESTER R. BACHNER
DR. HERBERT M. DIAMOND
HOWARD STEIN
HAROLD A. WEISSMAN
DR. ROBERT B. WOODWARD
WILLIAM P. ROGERS

3. Of the aforesaid directors, the following were not affiliated directors of the Dreyfus Fund within the meaning of Section 2(a)(3) of the Investment Company Act of 1940:

LESTER R. BACHNER
DR. HERBERT M. DIAMOND
HAROLD A. WEISSMAN
DR. ROBERT B. WOODWARD
WILLIAM P. ROGERS

/s/ LAWRENCE M. GREENE
LAWRENCE M. GREENE

Sworn to before me this
1st day of May, 1972.

/s/ STELLA FREEBURG
Notary Public
[NOTARY STAMP AND SEAL OMITTED]

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

[Caption Omitted]

Affidavit of Caleb Loring, Jr.

1. I am Clerk of Fidelity Trend Fund, Inc.

2. On December 18, 1968, the composition of the Board of Directors of Fidelity Trend Fund was as follows:

EDWARD C. JOHNSON 2d, President and Director of the Fund; President and a Director of Fidelity Management & Research Company, the investment adviser of the Fund; Director of The Crosby Corporation.

C. RODGERS BURGIN*, Director and private trustee; was Chairman of the Board of New England Merchants National Bank of Boston, from 1961 to 1964.

GEORGE R. HARDING*, a Director, has been a private trustee for many years.

GILBERT H. HOOD, JR.*, a Director; Chairman of the Executive Committee of H. P. Hood & Sons, Inc., and from 1962 to 1966 was President.

EDWARD C. JOHNSON 3d, Vice President and Director; Vice President and Director of Fidelity Management & Research Company, the investment adviser of the Fund; Director of The Crosby Corporation.

GEORGE K. MCKENZIE*, a Director; management consultant and during 1966 was a Vice President of U.S. Plywood Corp.

HORACE SCHERMERHORN*, a Director; retired and was until 1963 Chairman of the Board of The National Shawmut Bank of Boston.

Affidavit of Caleb Loring, Jr.

D. GEORGE SULLIVAN, Executive Vice President and a Director; Vice President of Fidelity Management & Research Company, the investment adviser of the Fund; Director of The Crosby Corporation.

The Directors whose names are marked by an asterisk (*) were not affiliated Directors of Fidelity Trend Fund within the meaning of Section 2(a)(3) of the Investment Company Act of 1940. All of the Directors may be reached at Fidelity Trend Fund, Inc., 35 Congress Street, Boston, Massachusetts 02109.

Dated: May 3, 1972

/s/ CALEB LORING, JR.
Clerk, Fidelity Trend Fund, Inc.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. May 3, 1972

Then personally appeared before me Caleb Loring, Jr., and made oath that the above statements were made to the best of his knowledge, information and belief.

/s/ ERNEST V. KLEIN
Notary Public
[NOTARY STAMP AND SEAL OMITTED]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted]

Affidavit on Behalf of Manhattan Fund, Inc.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JAMES H. ELLIS, being duly sworn, deposes and says:

1. I am the Vice President and Secretary of Manhattan Fund, Inc.

2. On December 18, 1968, the composition of the Board of Directors of Manhattan Fund, Inc. was as follows:

Name	Occupation	Officer, Director or Employee of Tsai Management & Research Corporation
Gerald Tsai, Jr.	President and Chairman of the Investment Committee, Tsai Management & Research Corporation	Yes
Joseph Auerbach	Partner in the law firm of Sullivan & Worcester, Boston, Mass.	Yes
John S. Fielden*	Dean of College of Business Administration and Professor of Business Administration, Boston University	No
Robert W. Purcell*	Chairman of the Finance Committee, International Basic Economy Corporation	No
Laurence A. Tisch*	Chairman of the Board and Chief Executive Officer, Loews Corporation	No

Affidavit on Behalf of Manhattan Fund, Inc.

3. The Directors whose names are marked by an asterisk (*) were not affiliated directors of the Manhattan Fund, Inc. within the meaning of Section 2(a)(3) of the Investment Company Act of 1940.

Dated: New York, New York

/s/ JAMES H. ELLIS
JAMES H. ELLIS, *Secretary*
Manhattan Fund, Inc.

Sworn to before me this
25th day of April, 1972

VINCENT A. MCINTYRE
Notary Public
[NOTARY STAMP OMITTED]

Excerpts from transcript of hearing before Pettine, C. J., on May 12, 1972

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted]

Before: Chief Judge R. J. Pettine
Friday, May 12, 1972

* * *

[32] THE COURT: You are asking the Court then to look just to the face of the complaint?

MR. PITTINSKY: That is correct, your Honor.

THE COURT: And apply the basic rule that must be accepted as truthful for the purpose of these motions.

MR. PITTINSKY: That is correct, your Honor. And that is exactly what the Court did in the cases we have cited. It's what the Court did in Leavitt v. Johnson and I will point that out on p. 817 they discuss the fact that there were some other papers filed, and this could have been treated as a motion for summary judgment, but they chose not to do it because they said, "We can't do that without a well developed, factual record, therefore, we limit ourselves to the face of the complaint." That's what they held in Leavitt v. Johnson.

THE COURT: You also represent that your complaint is sufficient in making the same allegation that you now argue?

MR. PITTINSKY: That is correct, your Honor.

Letter of David H. Pittinsky, Esq., to Russell H. Peck, Esq., dated June 26, 1972

June 26, 1972

RUSSELL H. PECK, ESQUIRE
Clerk, United States District Court
District of Massachusetts
1525 Post Office and Courthouse
Boston, Massachusetts 02109

In Re KMF Actions, MDL-78 (All Cases)

Dear Mr. Peck:

We have received a copy of the proposed form of Order submitted by liaison counsel on behalf of all defendants. On behalf of plaintiff, we object to paragraph 5 of defendants' proposed form of Order because said paragraph omits the words "without prejudice."

Insofar as the form of Order entered by Judge Pettine to reflect the rulings contained in his Opinion of June 7, 1972 is concerned, our reading of Judge Pettine's Opinion indicates the aforesaid action was dismissed for failure to make a demand upon the shareholders of two of the four Kauffman funds and the directors of all four Kauffman funds. In short, the commencement of the aforesaid action was held to be premature by Judge Pettine.

Accordingly, plaintiff respectfully suggests that paragraph 5 of defendants' proposed form of Order be amended to read as follows:

> "5. The cause be and the same hereby is dismissed without prejudice as to all defendants and final judgment be and the same hereby is entered in their favor;

Letter of David H. Pittinsky, Esq., to Russell H. Peck, Esq., dated June 26, 1972

and the Clerk of this Court shall give prompt notice hereof by mailing copies of this Order and the Court's Opinion to the Clerk, Judicial Panel on Multidistrict Litigation, and to the Clerks of each of the transferor District Courts herein."

Very truly yours,

/s/ DAVID H. PITTINSKY
DAVID H. PITTINSKY

DHP:jd

cc: HON. RAYMOND J. PETTINE (3)

All Defendants' Counsel on Master List R-4
AARON M. FINE, ESQUIRE
JOSEPH B. KAUFFMAN, ESQUIRE
ANSEL B. CHAPLIN, ESQUIRE